No. 87-1933

In The

Supreme Court of the United States

October Term, 1987

SANDY GOLGART, AN INDIVIDUAL,
SANDY GOLGART SALES, A CALIFORNIA
CORPORATION,

Petitioner

v.

CENTRAL PLASTICS COMPANY,
AN OKLAHOMA CORPORATION,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Central Plastics Company (Central),[1] the Respondent herein, respectfully submits that the above-entitled cause should not be reviewed by this Court for the following reasons.

QUESTION ONE, raised by Petitioner Golgart as to whether Central's motion under F.R.Civ.P. 52 and 59 was a tolling motion under F.R.A.P. 4(a)(4), is not truly in

[1]In accordance with Supreme Court Rule 28.1, Central notes that it is affiliated with The Tako Company, an Oklahoma corporation.

issue because that question was not decided adversely to Golgart by the Court of Appeals.

It is apparent from the Court of Appeals' decision of February 23, 1988, that the Court accepted Golgart's position that Central's motion was a proper motion under Rules 52 and 59 which tolled the time for filing a notice of appeal. The Court of Appeals stated that, "Within the time allowed, defendant filed a motion under Fed.R. Civ.P. 52 and 59 to alter or amend the judgment." (ORDER AND JUDGMENT of February 23, 1988, included as APPENDIX A to Petition for Writ of Certiorari).

As Golgart has correctly argued regarding QUESTION ONE, the motion filed by Central on July 13, 1987, entitled DEFENDANT'S MOTION TO AMEND FINDINGS AND JUDGMENT REGARDING ATTORNEYS' FEES AND COSTS AND BRIEF IN SUPPORT THEREOF was in fact a tolling motion under F.R.A.P. 4(a)(4). The trial court had specifically addressed the issue of attorneys' fees in its July 10, 1987, judgment and in its earlier findings. Thus, Central's motion under F.R.Civ.P. 52 and 59 requesting amendment of that judgment addressed issues which were integral in and not collateral to the judgment and served to toll the running of the time for filing of a notice of appeal under F.R.A.P. 4(a)(4). *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985).

Since the time for filing a notice of appeal was tolled, Golgart's first filed notice of appeal was moot, and in accordance with F.R.A.P. 4(a)(4):

> A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

QUESTION TWO raised by Golgart was never reached by the Court of Appeals, nor should it be by this Court, since that question assumes that Central's motion was not a tolling motion.

Thus, the only issue which the Court of Appeals decided adversely to Golgart was that which Golgart has styled as QUESTION THREE, namely whether Golgart timely filed a new notice of appeal after the Rule 52 and 59 motion was finally disposed of.

This really is only a question of interpretation of the above-quoted language from F.R.A.P. 4(a)(4). It is clear that a new notice of appeal must be filed; the only question is when.

The new notice must be filed "within the prescribed time" (thirty days) "from the entry of the order disposing of the [Rule 52 and 59] motion". F.R.A.P. 4(a)(4).

The "order disposing of the [Rule 52 and 59] motion" must of course be an order *finally* disposing of that motion. An interlocutory order dealing with the motion, which does not finally dispose of the motion, does not start the time for filing the new notice of appeal running. 28 U.S.C. § 1291.

Once the proper issue is isolated in this manner, it becomes apparent that the Court of Appeals' decision of February 23, 1988, dismissing Golgart's appeal as being from an interlocutory order was proper. There is nothing special about the circumstances of this case which would merit review by this Court.

Central's post-trial motion under Rules 52 and 59 to amend the findings and judgment regarding attorneys'

fees was not *finally* disposed of until both entitlement and amount were determined.

The August 5, 1987, order from which Golgart appealed was an interlocutory order determining only entitlement.

The trial court did not enter an order *finally* disposing of the motion under Rules 52 and 59 until its order of October 26, 1987. That is when the time for filing a new notice of appeal as required by F.R.A.P. 4(a)(4) began to run, and no notice of appeal was timely filed.

Golgart has contended in her petition that this Court should review this case because of some conflict between the Tenth Circuit's decision and previous decisions of this Court or of other circuits. It is not apparent what that conflict is. Certainly with regard to QUESTION THREE, Golgart has not pointed out any such conflict.

The only authority cited by Golgart as supportive of her position on QUESTION THREE is the Tenth Circuit's own prior decision in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982).

Even if there were conflict between that decision and the Tenth Circuit's decision in the instant case, that would not be an appropriate ground for invoking this Court's review by a petition for writ of certiorari. Supreme Court Rule 17.

Further, the *Cox* case is not applicable to the instant situation. *Cox* did not deal with the question of when a post-trial motion under Rules 52 or 59 was finally disposed of so as to start the time for filing a notice of appeal running anew. Cox dealt with the very different question of

whether a judgment finally disposing of the merits was appealable even though questions relating to attorneys' fees were yet undecided, in the situation where there had not been a tolling post-trial motion.

In conclusion, the Respondent, Central Plastics Company, respectfully prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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